

EXHIBIT 6

1 IN THE CIRCUIT COURT OF THE
2 SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

3 THE STATE OF FLORIDA

4 ex rel.

5 VEN-A-CARE OF THE FLORIDA
KEYS, INC., a Florida
6 Corporation, by and
through its principal
7 officers and directors,
ZACHARY T. BENTLEY and.
8 T. MARK JONES,

9 Plaintiffs,

10 vs. CASE NO.: 98-3032A

11 BOEHRINGER INGELHEIM
CORPORATION; DEY, INC.; DEY,
12 L.P.; EMD PHARMACEUTICALS,
INC.; LIPHA, S.A.; MERCK KGaA;
13 MERCK-LIPHA, S.A.; SCHERING
CORPORATION; SCHERING-PLOUGH
14 CORPORATION; ROXANE
LABORATORIES, INC.; and
15 WARRICK PHARMACEUTICALS
CORPORATION,

16 Defendants.

17 _____/

18 MOTION HEARING

19 The above-entitled matter came on to be heard
before the Honorable L. RALPH SMITH, presiding as Circuit

20 Judge, at Courtroom 3-B, Leon County Courthouse,
Tallahassee, Florida, on July 19, 2004, commencing at 3:40
21 p.m.

22

Reported by:
RAY D. CONVERY
Court Reporter

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1 P R O C E E D I N G S

2 THE COURT: Be seated.

3 MS. JOHNSON: Judge, I just had something hand-
4 delivered to you. I think it went the same way when
5 you were coming in the back way. I gave it to Karen,
6 but anyway, she will probably be coming in so --

7 THE COURT: Did you deliver it to the J.A.?

8 MS. JOHNSON: I gave it to Karen and she was going
9 to try and catch you, because we think we've made your
10 life a little bit easier. We're hoping so.

11 THE COURT: Okay. That would be good. Are you
12 ready to proceed or do I need to wait until we get
13 this?

14 MS. JOHNSON: Well, we can do it any way.

15 Let me just tell you a little bit about where we
16 are. We have various motions for protective order that
17 are pending that have been filed by all the different
18 parties, and we have spent a good bit of time trying to
19 come up with some language that might be agreeable to
20 us so that -- at least focus some of the issues for you

21 on where the areas of disagreement are.

22 I think all of the parties agree that we need a

23 protective order because this is going to be a document

24 with -- you know, a case with voluminous documents and

25 a lot OF privileged and sensitive information. So

1 we're not disputing, any of us, the need for a
2 protective order. The problems that we were dealing
3 with was how do we craft one. So we think we've taken
4 a good stab at it.

5 We're hoping that today we can finish everything
6 because basically what we've had is a sort of a stall
7 on the ability of the parties to exchange documents
8 because of the lack of a protective order. If you'll
9 remember, back at the hearing months ago, we talked
10 about all the documents, and with few exceptions the
11 parties are still sort of holding on to a lot of
12 documents that we haven't been able to exchange. So
13 we're hopeful today that we're going to be able to wrap
14 this up.

15 We essentially have two issues that are not
16 covered or not agreed on in that order. One is dealing
17 with the classification of the plaintiff in the case.

18 That may not seem like a big issue, but we have not
19 been able to agree on that.

20 It's our position that the Plaintiff is the State

21 of Florida as captioned in the case. The A.G.'s Office
22 believes that the Plaintiff or the appropriate party in
23 interest is the Attorney General and AHCA. So that's
24 one issue.

25 And the second issue is the disclosure of

1 documents to law enforcement personnel, which we have
2 not been able to agree on.

3 THE COURT: The second issue was what?

4 MS. JOHNSON: The disclosure of some of this
5 privileged information to law enforcement personnel
6 upon request. But otherwise the order is fairly --
7 we've spent an awful lot of time and we think we can
8 all live with it except for those two issues. I think
9 that I'm explaining everything appropriately.

10 MR. THOMAS: That's accurate, Your Honor, and we
11 can certainly address those in order.

12 First of all, the style of the case obviously
13 starts with the State of Florida. Judge, that's
14 required underneath Chapter 68. Section 68.083(2)
15 requires that qui tam actions in Florida be brought "in
16 the name of the State of Florida," quote/unquote,
17 that's the reason for the style.

18 Regardless, that doesn't translate to "and each
19 and every possible subdivision of the state of Florida
20 therein or there contained within." The complaint in

21 the body plainly states that it's brought on behalf of
22 the Office of the Attorney General, Charlie Crist,
23 representing itself and the victim in this instance, or
24 the alleged victim, the Agency for Health Care
25 Administration.

1 Judge, respectfully, the Defendants don't get to
2 pick who it is who's on the left-hand side of the V in
3 "Attorney General V." The Plaintiffs do. The A.G.
4 will of course cooperate continuously with the
5 Defendants in obtaining any information from any
6 governmental unit that we do not directly represent,
7 but necessarily the Attorney General reserves for
8 itself and only itself the right to state who it is
9 that they're the lawyer for, and we do not represent
10 cities. We do not represent counties. We don't
11 represent other executive agencies, only the Agency for
12 Health Care Administration.

13 THE COURT: What's the statute we're dealing with?

14 MR. THOMAS: Chapter 68, Judge.

15 THE COURT: Sixty-eight --

16 MR. THOMAS: 68.083.

17 THE COURT: Sixty-eight --

18 MR. THOMAS: Chapter 68, Section 68.083, paragraph
19 (2).

20 THE COURT: And what are the subsections now?

21 MR. THOMAS: .083 paragraph (2). And, as well,
22 Judge, there's a definition in the statutory
23 definitions in Chapter 68 expressly describing what the
24 word "agency" means. It's the particular entity being
25 represented.

1 This is purely a Medicaid case. The Agency for
2 Health Care is the single state agency that handles
3 Medicaid.

4 MS. JOHNSON: Judge, if I may, the crux of the
5 dispute I think has to do with the discovery-related
6 issues because our discovery that has gone to the
7 Attorney General's Office defined the Plaintiff as the
8 State of Florida and with Ven-A-Care as the Relators
9 part of the caption in the case, and there's been a
10 series of objections raised by the Attorney General's
11 Office that that is not appropriate, that they are only
12 representing themselves, the Attorney General's Office
13 and AHCA.

14 I did find one case that I would like to give to
15 Your Honor. It's United States vs. National
16 Broadcasting Company, and it's 65 FRD 415. It's a 1974
17 case. Judge, this case dealt with -- the Plaintiff was
18 the United States of America acting by and through the
19 Department of Justice, and it dealt with a variety of
20 discovery disputes, but on page three there -- you'll

21 see there is -- on the right-hand column it says
22 "First -- Preliminarily to resolution of the question
23 whether there has been any failure of compliance with
24 the Court's orders, several important considerations
25 arise. First, while the Department of Justice, upon

1 proper authorization by the Attorney General, brings
2 antitrust actions, the Department is not the plaintiff.
3 The Department of Justice is the plaintiff's counsel.
4 The plaintiff is the government of the United States
5 acting on behalf of its citizens. Therefore, when
6 considering what action was or was not taken in
7 compliance with the Court's orders, this court will
8 look to the actions or inactions of the government as a
9 whole, not just the Department of Justice."

10 We think that this case is very analogous to the
11 case that we have before Your Honor in that the
12 Attorney General is acting on behalf of the State and
13 is the lawyer, but the State is the overall plaintiff
14 and they control the agencies and have the ability to
15 get information from the agencies, which is really why
16 there's this dispute. And we think the caption in the
17 case is very clear. It is the State of Florida and
18 they can't try to narrow it.

19 Also in the prayer for relief they specifically
20 make a claim on behalf of the State of Florida and the

21 Relator against the Defendants. So we believe that,
22 appropriately in the protective order, that the style
23 of the case is the plaintiff is the State of Florida
24 and it should not be limited to AHCA and the Attorney
25 General's Office.

1 MR. THOMAS: And, Your Honor, in competing case
2 law that the Attorney General's Office feels is on
3 point, Marshal vs. NALC, United States District Court,
4 Southern District of New York, if I might quote:
5 "Plaintiff is hereby reminded that the discovery order
6 only requires the production of documents in the
7 possession, custody or control of the Defendant or of
8 another entity that keeps or supplies a personnel
9 record for the Defendant. The Defendants are not
10 required to obtain documents from other agencies for
11 production pursuant to the discovery order."

12 Your Honor, at no time has the Attorney General
13 represented that they in fact are the attorney for
14 anyone other than themselves and the victim in this
15 case, the Agency for Health Care Administration. And
16 as I previously stated, the Attorney General pledges
17 that we will be as cooperative as possible in helping
18 to obtain any information that we might be able to from
19 anyone, whether it be a governmental entity or not,
20 pursuant to any discovery requests or public record

21 requests of any of the Defendants. We're not
22 attempting to withhold anything, and we will be
23 absolutely cooperative.

24 What concerns us is the assertion that we
25 represent people that we do not feel that we represent

1 in this action. That's highly troublesome for us
2 because we necessarily must feel that we have command
3 over whom it is we have as a client, who we owe a duty
4 to and who we represent as attorneys.

5 THE COURT: It's your position that the Attorney
6 General is the head of the Department of Legal Affairs.

7 MR. THOMAS: Yes, sir.

8 THE COURT: So the Department is bringing the
9 action through the head of the Department, the Attorney
10 General --

11 MR. THOMAS: Yes, sir.

12 THE COURT: -- on behalf of the State of Florida.

13 MR. THOMAS: Yes, sir. That's the caption that's
14 required pursuant to the statute.

15 THE COURT: But it's the Department through the
16 department head, the Attorney General, that's bringing
17 the action.

18 MR. THOMAS: Yes, sir.

19 THE COURT: Well, I think that's the way the
20 statute reads.

21 MR. THOMAS: Yes, sir. And in any analogous
22 circumstance, when one entity agency such as the
23 Department of Legal Affairs brings an action, it
24 certainly does not mean all of the executive- or
25 cabinet-level agencies; it is the agency that is

1 expressly bringing the action.

2 THE COURT: Well, in 68.083 it makes reference to
3 the department bringing the action.

4 MR. THOMAS: Yes, sir.

5 THE COURT: And in 68.082 it defines what the
6 department is.

7 MR. THOMAS: Yes, sir.

8 THE COURT: Which is the Department of Legal
9 Affairs.

10 MR. THOMAS: That's correct, sir, one agency, the
11 Department of Legal Affairs.

12 THE COURT: That's what -- that's the way it's
13 defined in the statutes.

14 MR. THOMAS: Yes, sir.

15 MS. JOHNSON: Judge, our position is that the
16 Department is not the one that brought the lawsuit; the
17 state of Florida is, as indicated in the caption of the
18 case. The lawsuit is styled the State of Florida, ex
19 rel. Ven-A-Care of the Florida Keys. It's not styled
20 "Department of Legal Affairs."

21 MR. THOMAS: Judge, for us to have styled it the
22 "Department of Legal Affairs and the Agency for Health
23 Care Administration," we would not have been in
24 compliance with 68.083(2). That section requires that
25 the words, "the state of Florida," appear in the

1 caption.

2 THE COURT: That it be brought in the name of the
3 State of Florida.

4 MR. THOMAS: Yes, sir.

5 THE COURT: Well, I think that's -- you've
6 complied with the statute.

7 MR. THOMAS: Yes, sir, as we're required to.

8 MS. JOHNSON: And, Judge, that's what we're
9 saying: They have complied with the statute. It is
10 brought in the name the State of Florida. The State of
11 Florida is the Plaintiff. They can't say that the
12 State of Florida is somebody else, and that case that I
13 gave you is very analogous.

14 THE COURT: Do you have a case you want me to look
15 at?

16 MR. BREEN: Your Honor, Jim Breen for the Relator,
17 Ven-A-Care. I just wanted to clarify a point if I
18 could. I think the issue here is -- I don't think
19 there's any question that the Attorney General
20 represents the State of Florida. We're all in

21 agreement on that. Just kicking off discovery in this
22 case, I think what everybody's trying to do is make
23 sure that the lines of attack on discovery are real
24 clear, and some of the discovery demands that have been
25 made by the Defendants and directed to the Attorney

1 General don't just deal with the agency that's the
2 primary agency here that paid the Medicaid claims,
3 which is the Agency for Health Care Administration.
4 There's no doubt that the Attorney General represents
5 the State of Florida and the Agency for Health Care
6 Administration has brought this false claims action for
7 Medicaid fraud. That's what the case is about.

8 The problem is a discovery issue, and it's maybe
9 perhaps more of a Rule 1.280 issue than anything else,
10 and that is, when the Defendants served a request for
11 production on the Attorney General who's trying to
12 collect for Medicaid fraud against the Agency for
13 Health Care Administration, does the Attorney General
14 have to go down to Dade county or the local government
15 or do they have to go to the Department of
16 Transportation to find records, or do they have to go
17 to the Department of Corrections to find records or the
18 Board of Education, the Department of Education to find
19 records? That's the issue, and that's the issue we're
20 going to run into in discovery.

21 What we respectfully submit is that the discovery
22 in this case and the way the statute is set up, it
23 should -- discovery should follow, and that is that
24 there was a Medicaid fraud committed, at least alleged,
25 on the Agency for Health Care Administration. It cost

1 the state of Florida money. The Attorney General's
2 brought the lawsuit. The State of Florida should
3 answer discovery as in any other case, but it's got to
4 be kind of clear -- it's got to be clear going into it
5 who the real parties in interest are here. And it is
6 the state of Florida through its Agency for Health Care
7 Administration, and every time the Attorney General
8 gets a request for production it should not have to go
9 to the 20-plus agencies or local governments to find
10 documents and what have you.

11 To the extent that the Defendants want anything
12 from those other agencies or governmental entities,
13 they should request them by subpoena or whatever
14 mechanism they want and, of course, the Attorney
15 General and the Relator will cooperate fully in
16 discovery against third parties also. But we just want
17 it real clear going into this case that they can't be
18 inundating the Attorney General's Office with demands
19 for discovery that are far, far, far broader than the
20 allegations in this case by using the many agencies of

21 the State of Florida or local governments. That's the
22 issue, and I think that's -- I think that's the issue
23 that we're trying to kind of get some clarification of
24 going into discovery here, Judge.

25 THE COURT: Well, I think, if we were dealing with

1 a private individual bringing the action in the name of
2 the State of Florida, that private individual would be
3 bringing it on behalf of the State of Florida, but they
4 wouldn't have access to any of those agency records in
5 the least and they couldn't possibly provide those
6 requested documents. If the Department of Legal
7 Affairs takes over that action, they ought to be in the
8 same posture.

9 So I think, you know, even though this case that
10 you've cited to me is analogous, that's a federal case
11 dealing with the federal system and that's a district
12 court case out of California that doesn't appear to
13 have -- it must not have the same statutory language we
14 have here. So I think our statute -- the statutory
15 provision of our statute supports the position of the
16 State and that would be the order of the Court.

17 MR. BREEN: And, Your Honor, the only other issue
18 outstanding on the protective order -- and,
19 Ms. Overstreet, correct me if I'm wrong, but it gets to
20 this -- and we've worked hard on this, Judge. You can

21 see this order's long, and there's a lot of things to
22 it and a lot of thought has gone into it, but the
23 bottom line here and the dispute that we just can't get
24 over -- and we need to get it resolved so that we can
25 finish this thing and get on with our discovery. These

1 lawsuits, they're all over the country. They've been
2 brought by a number of states. There's federal
3 investigations going on against these Defendants and
4 others, other drug companies, and the state attorney
5 generals and the Department of Justice are constantly
6 sharing information with each other, both on a civil
7 level, a civil investigative level, on a civil lawsuit
8 level, and on a criminal level. And the question
9 becomes, when we get requested -- and when I say "we,"
10 the Relator, and my client, Ven-A-Care, has been
11 subpoenaed by Congress and by a number of other people
12 also, or an attorney general gets a request from other
13 law enforcement agencies, when we get requested
14 information by subpoena or by government request from
15 one investigative agency to another, what notice if any
16 do we have to give to the Defendants?

17 The protective order we've worked out provides for
18 a mechanism for turning that information over, I think,
19 but the question is what notice do we have to give to
20 the Defendants? And I believe, and it's our position,

21 the Relator and the State Attorney General, that if
22 it's a civil -- purely a civil request or that type of
23 thing, I don't think there's any objection to giving
24 them notice of it; is that correct?

25 MR. THOMAS: Absolutely not, Your Honor.

1 MR. BREEN: But if criminal law enforcement
2 authorities ask us or other investigative agencies ask
3 the Attorney General or the Relator for information and
4 they're qualified under your protective order to get
5 the information and they ask us not to tell the
6 Defendants about it, we shouldn't have to give the
7 Defendants notice. Maybe we should have to file
8 something with Your Honor in camera or at least have
9 the record covered, but we shouldn't have to go and
10 tell the Defendants if information's requested of us of
11 an entity that's allowed to have the information under
12 your protective order because we've agreed to that. We
13 shouldn't have to give the Defendants notice about
14 that, and that's what the issue is.

15 MR. McDONALD: Your Honor, I'm John McDonald
16 representing Warrick and Schering.

17 Actually Mr. Breen I think jumped the gun a little
18 bit as far as what our agreement is. We have not come
19 to any kind of agreement about allowing either the
20 State or the Relator to share information with other

21 law enforcement officials, and this is in the civil
22 context. I don't mean to address what may happen
23 through a criminal subpoena or grand jury subpoena or
24 something like that, but in the civil context of the
25 State volunteering information or Ven-A-Care

1 voluntarily sharing information with other attorney
2 generals, we have not come to any kind of agreement on
3 that.

4 The Defendants are very much against allowing the
5 State or Ven-A-Care to share our highly confidential
6 pricing information and confidential internal
7 information with other third parties, and that includes
8 law enforcement officials in other states and the
9 federal government. I don't know of any reason why the
10 State needs to go do that.

11 Mr. Thomas just got up here and made a very strong
12 argument about how he only represents this one
13 individual agency in the State of Texas, and he doesn't
14 represent any other agencies and he doesn't represent
15 any other entities, and he doesn't represent any other
16 persons, yet now they want to be able to take this
17 information and ship it out throughout the United
18 States. I don't understand that argument. It's
19 important to us to maintain control of this
20 information.

21 If these other state officials or law enforcement
22 agencies want this information from my client or from
23 Dey, they have the authority to do that. They can
24 institute their own proceeding. They can institute
25 their own CID process, and they can ask for that

1 information from us directly.

2 We are just asking that we are able to maintain
3 control of that information. I don't understand why
4 the State of Florida needs to be a portal through which
5 our confidential information is shipped throughout the
6 United States.

7 MS. MILLER: Judge, I'll be brief. It's an
8 interesting argument; however, there's already
9 precedent for the State of Texas acting as a portal for
10 shipping confidential information which they wish to so
11 dearly control. It's been happening in Texas. We
12 attached the Texas protective order to our motions --
13 to the various motions, as did the Defendants. That
14 order provided for sharing with law enforcement
15 personnel from other states, and we are merely asking
16 to do the same.

17 There are lawsuits being filed by other states.
18 There has been information being -- that has been
19 swapped between the states. That's how this state has
20 gotten some information pursuant to that protective

21 order after signing off on an agreement that we will
22 not disclose it to an inappropriate person, therefore
23 giving the defendants some measure of comfort.

24 It also seems to me there's also subpoenas being
25 issued just about every day in ongoing investigations.

1 This all gets tied into the notice issues that
2 Mr. Breen has raised that, if there is a criminal
3 investigation ongoing, certainly we can't be telling
4 the defendant about that. If it's something from
5 another state, it might not -- they may or may not be
6 the target, but we can't be telling them that. The
7 same thing for another qui tam lawsuit that may be
8 under seal.

9 On top of that, it just seems to me, well, why not
10 have Florida be a portal for the other states? The
11 other states will bear the burden of the expense. I'm
12 sure the Defendants will offer to share in that expense
13 to avoid this, but at the same time it may avoid the
14 whole CID or the investigative subpoena issue coming up
15 at all or even being issued, and then there's the risk,
16 of course, to the Defendants that such a subpoena would
17 make the papers and then their stocks would take a hit.
18 This is another way for the Defendants to get the -- to
19 be cooperative without having to run the risk of the
20 publicity. Thank you.

21 MR. McDONALD: Your Honor, if I may, I honestly
22 don't understand the issue about stocks, and that's
23 nowhere in our motivation.

24 My client is currently subject to nine other
25 lawsuits throughout various states as well as a

1 multi-district litigation pending in Massachusetts.

2 The Texas case which is now over did allow the
3 State of Texas, the Attorney General to share this
4 information with limited law enforcement personnel upon
5 the condition that they not only gave us notice of any
6 such disclosure, as well as they also told us what they
7 gave, but that case is over.

8 The Plaintiffs in West Virginia sought this same
9 type of relief, and if we're citing precedent, the West
10 Virginia court denied the Plaintiffs the ability to
11 share that information with other law enforcement
12 personnel.

13 There is also no mechanism in the pending
14 multi-district-court litigation pending in Massachusetts
15 that allows the Plaintiffs in that case to share
16 information produced in that case with other law
17 enforcement personnel.

18 If Ms. Miller wants to argue that this information
19 is already out there, well then, it's already out there
20 and we'll deal with that through the Texas court; but

21 we don't want to have all these various courts and this
22 information being spread through all various
23 mechanisms. We want to maintain control of our
24 confidential, highly confidential information.

25 THE COURT: Well, what is the type of information

1 that you contend to be confidential?

2 MR. McDONALD: Well, for example, Your Honor, dead
3 net pricing, absolute bottom-line pricing information
4 that has been provided or will be provided to the State
5 in conjunction --

6 THE COURT: That term doesn't mean anything to me.

7 MR. McDONALD: That means essentially the absolute
8 lowest price that our product would be sold minus
9 rebates, whatever else may be out there, the absolute
10 bottom-line lowest price. It's very proprietary
11 information. In fact, you know, I'm concerned about
12 frankly sharing that with our co-defendants because at
13 the end of the day we're competitors. We're selling
14 the same information. It's very proprietary
15 information. For a company to let out its pricing
16 information, competitors -- their competitors out there
17 in the industry can take advantage of learning that
18 type of information, and we're trying to maintain
19 control of it.

20 THE COURT: Well, if the government is paying for

21 prescription drugs based upon a percentage of what they
22 think the average wholesale price is and a manufacturer
23 knows that the government's trying to find out what
24 that average wholesale price is, and if the
25 manufacturer doesn't respond direct to the government

1 but responds by making representations to some other
2 entity that they know will do that for them, the
3 accuracy of that information is something that I think
4 the government's entitled to know.

5 If your company manufactures drugs and they know
6 that there's an information-gathering company that
7 finds out the information that -- the most reliable
8 information they can from all of the manufacturers,
9 what is the average wholesale price, because they'll
10 make that information then available to -- in Florida
11 to AHCA or the other governmental agencies. If they
12 are making false statements as to that advertisement,
13 that average wholesale price, knowing that AHCA's going
14 to be relying on it, that may be the gravamen of an
15 action against them, that may be what that this case is
16 all about, I don't know. But whatever information they
17 gather from this lawsuit should hardly be, you know,
18 confidential information. I mean, if your
19 manufacturing company has disclosed it to this
20 information-gathering organization, that's publication

21 to the world.

22 MR. McDONALD: Your Honor, I don't disagree that

23 publicly disclosed information is not confidential.

24 We're not talking about those types of documents.

25 We're talking about documents that are not otherwise

1 public. This is private, proprietary information that
2 is not made public.

3 THE COURT: But if that's information that the
4 Department of Legal Affairs is able to discover through
5 proper discovery devices in a lawsuit and they get that
6 information, if the Court that orders you to provide
7 that to them concludes that that is confidential and it
8 can't be disclosed to anyone else, such an order can be
9 entered. If the Court looks at it and concludes that
10 -- it's understandable you wouldn't necessarily want
11 someone to know about it, but you can't prevent that
12 from being shared. A lot of companies, when they
13 settle multi-million-dollar tort claim, they like to
14 keep all that information confidential so lawyers in
15 other states won't be able to discover it, but if it's
16 not things that you can seal the court file on, when
17 you file a lawsuit or get involved in a lawsuit, it
18 becomes public information, but I don't know what
19 information y'all are trying to protect.

20 MR. McDONALD: Your Honor, unfortunately I don't

21 have specific examples of documents that I can provide
22 to the Court to have some type of hearing on. I don't
23 think the Plaintiffs, either the State or Ven-A-Care,
24 disputes that the Defendants in this case will produce
25 information that should be subject to a protective

1 order and should not be made public. I don't think
2 there's any contention by the Plaintiffs or
3 Ven-A-Care -- and I think they'll correct me if I'm
4 misstating that.

5 The issue then is, of this information that they
6 acknowledge should be covered by a protective order,
7 should they then be allowed to share that
8 protective-order-cloaked information with other
9 attorney generals in other states and other law
10 enforcement officials? That's the first question:
11 Should they be allowed to do that?

12 We take the position that, no, they shouldn't be
13 allowed to do that. If these other law enforcement
14 officials or other states want that information from
15 us, they have courts in their states that can spend
16 their time and they can go do that, can go through
17 their own process to get that information from them and
18 we can deal with that.

19 The second issue then, if the Court disagrees with
20 us and says, well, no, I believe that the State can

21 share that information with other law enforcement
22 personnel, then we would ask that, as in the Texas
23 proceeding, the Court provide that the State should
24 give us notice of who they've given this information to
25 and what exactly they've provided these other officials

1 so that we can maintain control over these -- of this
2 information so that, if it shows up in some newspaper
3 or becomes public, we'll have a way of tracing of how
4 it got there. If in fact we don't know who it was
5 given to or what was given to these people, we'll have
6 no way of doing that.

7 MR. BREEN: Your Honor, maybe there's a way we can
8 kind of move to this a little bit more deliberately and
9 slowly.

10 Our primary concern, as I understand it, as
11 Mr. McDonald said, there's two issues: One, is it
12 confidential? In other words, should the whole world
13 know about it or not, like the product liability cases
14 or those types of situations; should the whole world
15 know about it or not?

16 The other one is: Should other law enforcement
17 agencies know about it, and if so, should we have to
18 tell the Defendants that we told them about it? Really
19 two different issues.

20 Maybe a way to resolve this would be to hold off

21 on the issue of whether or not the proprietary -- this
22 information that the Defendants are claiming is
23 proprietary -- let them mark it as confidential, let
24 them mark it as the categories we have in our
25 protective order, and then, to the extent that we're

1 going to contest that, we'll contest it and then Your
2 Honor will have the actual information in front of you
3 so you can make a ruling and everybody can make their
4 arguments.

5 But in terms of sharing with other law
6 enforcement, if we get a criminal request from a
7 federal or state agency that's conducting a criminal
8 investigation, then we would request that we be allowed
9 to honor that request and turn the information over and
10 not have to give the Defendants notice of that.

11 Perhaps we can make a -- file something in camera or
12 under seal or keep a log of it that we'd have to
13 produce upon being required to produce it, but the only
14 thing we're asking is that we not be required to go
15 tell the Defendants if we're asked by a criminal law
16 enforcement agency to provide this information. That's
17 really a separate issue.

18 As far as the issue of whether it's confidential
19 and should be disclosed in the first place or under
20 what conditions if any we can share it with another

21 attorney general's office in a civil investigation, we
22 can come back with the specific information and Your
23 Honor could rule on that perhaps having the exact
24 information in front you if that would be necessary at
25 the time.

1 THE COURT: Well, I feel like the Court would have
2 a very difficult time in entering any kind of order
3 today that would cover every conceivable piece of
4 information that might be relevant to this lawsuit.

5 With what I know about the essential elements of
6 the claims, I have a very, very difficult time
7 believing that that information is confidential that
8 deals with pricing. In other words, a manufacturer may
9 sell to Wal-Mart for, you know, an extremely low price
10 because of the volume they're dealing with, whereas
11 they might not sell to Sears & Roebuck that used to be
12 the giant at the same price. They may not want, you
13 know, Sears & Roebuck to know what they're selling it
14 to Wal-Mart for, but the fact that that may be
15 information that they want to not have to disclose may
16 be their private business where they never have to
17 disclose it, but if they're telling the government that
18 we're going to supply the armed forces with these same
19 products that we provide to Sears & Roebuck or to
20 Wal-Mart and we will -- because of the volume we know

21 that you're going to be buying, we'll sell it to you
22 for 90 percent of our lowest wholesale prize, you've
23 then opened yourself up. You can't keep that secret
24 anymore. The government would be entitled, if they're
25 claiming that there's been some kind of fraud

1 perpetrated on the government, to obtain that
2 information. If the government obtains that
3 information and it's revealed that the manufacturer was
4 charging these prices, then it's going to be public
5 information. There's no reason that anyone should
6 protect the manufacturer from that.

7 The government may in the course of litigation
8 say, well, we're willing to enter into these
9 confidentiality agreements, and we have no desire to
10 disclose to other states because we're interested in
11 our lawsuit, but another state may come in and say,
12 well, for us to plow that same ground will be requiring
13 us to duplicate these same resources that have drained
14 the State of Florida, and why should the manufacturers
15 be able to put us to that expense? And as to the
16 example I just mentioned, I think the answer would be
17 they should not be.

18 Now, for us to -- for you to ask me to now
19 determine which one of those issues will always be
20 trade secret or never be trade secret, I couldn't enter

21 an order like that today, and I don't know where y'all
22 have gotten -- I couldn't just carte blanche say
23 everything that you discover in the course of this
24 lawsuit you can share with anybody in the world by just
25 giving them notice of it, or even if I don't want to

1 give them notice, if it's a criminal case, then I don't
2 know that I can necessarily -- I know I can't with the
3 information I've got right now.

4 If you can give me some idea about the nature of
5 the information that according to counsel here the
6 State concedes is confidential, then that type thing,
7 if it's truly confidential, you may not should be able
8 to share it with anybody.

9 MR. BREEN: Well, Your Honor, I think you've hit
10 the nail on the head. What we're trying to do and
11 we're -- what this protective order is designed to do
12 is not for either side to be admitting -- when the
13 other one says it's confidential, the other side's not
14 admitting it's confidential, but the protective order
15 is designed to let -- to give everybody a fair
16 opportunity to mark their documents under these
17 classifications that we've agreed on the
18 classifications, and then, if anybody wants to dispute
19 it, we've got an opportunity to do it. So we've set
20 the system up for that.

21 The limited question is: Who if anybody can we
22 share it with, government-agency-wise, before coming
23 back and getting an order from Your Honor? That's the
24 question. And if Your Honor's inclined to say we can't
25 come up with an order saying you can share it with

1 anybody until you come back and get another order from
2 me, then I guess that's where we are, and we understand
3 that, but we just need to know today going forward what
4 the rules are.

5 THE COURT: Well, I know from personal experience
6 as a lawyer and now from the viewpoint of the bench
7 that there's some people in litigation, either the
8 lawyers or the clients who have a stamp that's called
9 "confidential" and they stamp it on every piece of
10 paper that comes through their office, whether it's a
11 notice of hearing or anything else. It's just
12 someone's got a full-time job with that stamp, and when
13 they go to produce the information in the course of a
14 lawsuit, stamp it confidential, not to be disclosed to
15 anyone else. Well, that may be very prophylactic on
16 certain things, but it causes an enormous amount of
17 problems to the system.

18 There's some companies, every time they settle a
19 lawsuit, they want an agreement to seal the file. Even
20 in states like Florida where you've had public record

21 records statutes, state agencies years ago destroyed
22 files. Without any approval from the archives or
23 anybody, because of settlement of a lawsuit, they
24 destroyed them.

25 Now, there's no need to make it such a major feat

1 to protect something that's truly confidential. If
2 it's not truly confidential, then don't make it appear
3 that it is. I don't know --

4 MR. PALERMO: Your Honor, if I might, Chris
5 Palermo on behalf of Dey. I believe Mr. Breen has
6 described in general the issues in the sense that
7 there's a procedure in the draft of the protective
8 order that was submitted to Your Honor that would allow
9 for challenges to confidential designations, so that
10 the issue at the present time that's before the Court
11 is the issue, which is a narrower issue, in terms of
12 whether or not the State should have the right to
13 disclose information that they have to law enforcement
14 agencies.

15 And the -- as I understand it -- and I'm sure
16 counsel that's present will correct me if I'm wrong,
17 but as I understand it, that issue has come up in West
18 Virginia where the State of West Virginia was denied
19 the right to disclose it to other law enforcement
20 agencies, and in Texas where, to the extent that

21 disclosure to other law enforcement agencies was
22 permitted, the State was required to give notice to the
23 Defendants that the information was being -- to whom
24 the information was being disclosed and notice as to
25 what information was being disclosed.

1 I don't think that there's a case in these groups
2 of cases where the state has an unfettered right to
3 disclose to a law enforcement agency pursuant to a
4 court order.

5 And I think that, as the motions for protective
6 order made clear, both sides are in agreement
7 conceptually that there needs to be a protective order
8 for certain information that is at the heart of this
9 lawsuit. So that I think the procedures that we've
10 worked very hard to try to establish in the protective
11 order that we've submitted will allow the designations
12 to be made subject to the right of challenge, and
13 hopefully, I think, on all sides, reduce the number of
14 instances in which issues needs to be brought to the
15 Court's attention with respect to whether a type of
16 information is confidential, highly confidential or
17 otherwise. That was the intention broadly, I think, in
18 terms of the negotiations we had back and forth
19 regarding the protective order.

20 THE COURT: Is there something in this proposed

21 protective order that identifies the information that
22 both parties acknowledge is confidential and should
23 never be revealed to anybody?

24 MR. BREEN: Well, Your Honor, it doesn't go
25 that -- in other words, what the protective order does,

1 it sets up the classifications for confidential
2 information.

3 We haven't come to -- until we actually see a
4 document or group of documents that they've put the
5 classification on, we can't say whether we would agree
6 that it would meet that classification or not; but what
7 the protective order does is it gives us a procedure so
8 that we can work it out.

9 I can tell you that in Texas -- and Mr. McDonald
10 and I just litigated this case over three and a half
11 years in Texas -- we probably turned over, I don't
12 know, a million documents, and I don't know that we
13 ever had to litigate one time the classification on a
14 document; did we?

15 MR. McDONALD: We did not.

16 MR. BREEN: We had a procedure in place. Now,
17 granted that the rules of judicial administration are a
18 little more flexible there than they are in Florida in
19 terms of sealed documents and confidential protective
20 orders, but still we were able to do that, and we never

21 really had a problem we had to present to the Court

22 with respect to the classification of documents.

23 The protective order was designed to allow us to

24 works these things out but to have some rules so that,

25 if there is something we have to bring to Your Honor,

1 it's limited and it's clear what we're bringing to the
2 court for a resolution.

3 Now, when the time comes to give them -- publish
4 them to a jury, that will be a different issue and
5 we'll have to then approach that separately if and when
6 that time comes. But the protective order we've got in
7 place is -- I think we've got it 100 percent worked out
8 by agreement with the question of, number one, can we
9 turn them over to these qualified persons without
10 notice? And if I'm -- what I'm hearing is perhaps the
11 best way to do this is not to turn them over to anybody
12 unless we come back to see Your Honor and -- either by
13 agreement, by subsequent agreement, or come back to see
14 Your Honor and have Your Honor make the decision.

15 THE COURT: Well, I think, if y'all are trying to
16 work out an agreement along those lines that you're
17 talking about, that both sides ought to be realistic
18 enough to know that, if the State of Colorado has not
19 yet filed an action like this but they know that their
20 citizens are getting ripped off by paying too high for

21 drugs and you can go to Canada and get it cheaper or
22 you can go to Texas and get it cheaper, then Colorado
23 may have a very sincere interest in bringing an action
24 like this on their own.
25 Now, if they would be entitled to file a suit and

1 get this information out there or in federal court in
2 Colorado, they ought to be able to get this information
3 from another state that's done the same things. And
4 so, if you have a confidentiality agreement or a
5 protective order that would enforce a confidentiality
6 agreement saying, all right, you've gotten this
7 information, and if your counterpart in another state
8 occupying that same identical role, the attorney
9 general or the agency that's entitled to bring these
10 type actions wants this information, you can give it to
11 them at will; you don't have to tell anybody you've
12 done it. As a matter of fact, it may be more effective
13 in getting the accurate information if they don't know,
14 but you don't have to tell anybody.

15 Now, if a competitor of a manufacturer called and
16 said, oh, we know you've got all this information about
17 how much they're charging Wal-Mart for this product and
18 it's not in the Wall Street Journal yet and it's not in
19 these other places and it's not been presented to a
20 jury yet but we want you to tell us so that we can

21 compete favorably with them, then you couldn't give
22 them that. But a governmental agency who is trying to
23 make people be honest ought to be able to do it.

24 MR. BREEN: And that's all we ask, Judge. We're
25 asking -- the categories of agencies that we're -- the

1 Attorney General is asking for leave to be able to
2 share this information with are other state attorney
3 generals, the Department of Justice --

4 THE COURT: And you can put in that that you can
5 only do that then if that state attorney general will
6 agree to a confidentiality --

7 MR. BREEN: It's in there. They've actually not
8 only agreed with the confidentiality, but signed and
9 agreed to be bound by Your Honor's jurisdiction. It's
10 already in the order.

11 MR. AZORSKY: It's in our proposed language.

12 THE COURT: I don't see where that should be --
13 pose a problem to anybody that wants to be honest.

14 MR. BREEN: That's all we ask, Judge, and the
15 question is: Do we have to notify the Defendants if
16 the State of Colorado Attorney General asks our
17 attorney general for the information? Do we have to
18 tell the Defendants they asked for it?

19 THE COURT: The same type of information they
20 could get to out there, they ought to be able to get to

21 it through you.

22 MR. BREEN: That's it, and that's what the

23 Attorney General is trying to do to be able to bring

24 these actions without spending a lot of extra money.

25 MR. McDONALD: Your Honor, I want to stress it's

1 not a matter of being honest. Our clients try to be
2 honest with giving information that's requested of
3 them, and we're not anywhere close to being on the
4 merits of this case, and we have all kinds of evidence
5 to show Your Honor about how our clients have been
6 honest.

7 What we're trying to address here today as far as
8 this information is we really are trying to maintain
9 control over this information, and again, we have not
10 exchanged information in this case, but as Mr. Breen
11 said, he and I have been through three and a half years
12 of litigation in Texas, so he knows that some of this
13 information that I'm going to give to him, he's going
14 to agree it's confidential and it's highly proprietary,
15 and I don't think he can legitimately dispute that.

16 I'm trying to maintain control over where that
17 information goes. If it goes to Arkansas -- and I
18 don't know what their Freedom of Information Act laws
19 are and how that information is then going to get
20 disseminated. We want to maintain control over where

21 this information is going, who it's going to and what
22 they're getting.

23 I respect Your Honor's ruling that you have told
24 us today that you're going to allow the Attorney
25 General to share it with other law enforcement

1 officials. Obviously we've opposed that, but I respect
2 the Court's ruling.

3 We would ask Your Honor, though, that the Attorney
4 General, if they're going to share this information,
5 that they tell us what information they're giving to
6 these law enforcement officials so that we can maintain
7 control of our -- and we know who has our proprietary
8 information out there within the universe. Otherwise
9 you just can't maintain control over it. You might as
10 well publish it somewhere.

11 MS. JOHNSON: And, Judge, if I might add, too,
12 this worked very well in Texas, and we've got copies of
13 the letters, and it was just done as a matter of
14 procedure where, when the documents were disclosed, it
15 was done by Bates number and, you know, the following
16 documents were given to this agency, and it wasn't a
17 problem, and that would at least satisfy our concern
18 about control over the documents.

19 MR. THOMAS: Your Honor, I thought I had heard you
20 rule on this matter.

21 THE COURT: Well, we can rehash it all day long, I

22 guess.

23 MR. THOMAS: Not on our behalf, sir.

24 MS. MILLER: You've heard our position.

25 Judge, would you like for us to submit a proposed

1 order to you?

2 THE COURT: I think, if you'll do it along the
3 lines of what I have articulated there --

4 MS. MILLER: Yes, I'd be delighted to do that.

5 THE COURT: -- I think that's the proper way to do
6 it.

7 MR. THOMAS: Very good, sir.

8 MS. JOHNSON: Judge, if I can just clarify, I
9 didn't hear you rule on whether or not they had to give
10 us notice.

11 THE COURT: I don't think that they should be when
12 they're giving it to another state agency that would be
13 entitled to get that same information in their own
14 lawsuit and if they agree to the restriction that they
15 won't disclose it to people who are otherwise like
16 competitors or something of that nature. Any
17 governmental agency that's trying to get to the bottom
18 of all this claim that the drugs are being charged too
19 high to the government, if not honesty in disclosure of
20 information, I think the governmental agencies ought to

21 be able to get that information and they wouldn't have
22 to -- the State of Florida wouldn't have to tell you
23 that they've given this information to some other state
24 who hasn't yet gone through this process.

25 MS. JOHNSON: And I guess our concern is that this

1 will be different from how it's been handled in all
2 these other states that have dealt with this issue, and
3 at a minimum we think it would be sort of the middle
4 ground to -- if they're going to give the documents, to
5 at least notify who they're giving them to and what
6 they're giving, and it's worked in Texas and it wasn't
7 a problem.

8 THE COURT: I think that, if we can avoid a lot of
9 this unnecessary bureaucracy, the whole country would
10 not better off. This is not just a small, isolated
11 local problem. This is a national and I guess
12 potentially international concern. I think that the
13 information ought to be available to the government to
14 share with other governmental agencies who have the
15 right two get that same type of information as long as
16 that attorney general or law enforcement agency will
17 agree to the restrictions that are -- that we've been
18 discussing here.

19 MR. BREEN: Very well.

20 THE COURT: All right. If you would prepare an

21 order.

22 MS. MILLER: Yes, sir. We'll get it to you as

23 soon as possible.

24 MR. TOOLE: Your Honor, would it be your

25 preference for your rulings on these two points to be

1 incorporated in the protective order that has already
2 been submitted to you as opposed to a separate order,
3 because certainly that would seem to make sense?

4 MR. AZORSKY: Yeah. We will amend the protective
5 order that was submitted to conform to your rulings
6 today.

7 MS. MILLER: Yes, that was my plan.

8 MR. BREEN: Thank you, Your Honor.

9 MR. THOMAS: Thank you, Judge.

10 (Whereupon, the proceeding was concluded at 4:36
11 p.m.)

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1 C E R T I F I C A T E

2 STATE OF FLORIDA)

3 COUNTY OF LEON)

4 I, RAY D. CONVERY, Court Reporter at Tallahassee,

5 Florida, do hereby certify as follows:

6 THAT I correctly reported in shorthand the

7 foregoing proceedings at the time and place stated in the

8 caption hereof;

9 THAT I later reduced the shorthand notes to

10 typewriting, or under my supervision, and that the foregoing

11 pages 4 through 43 represent a true, correct, and complete

12 transcript of said proceedings;

13 And I further certify that I am not of kin or

14 counsel to the parties in the case; am not in the regular

15 employ of counsel for any of said parties; nor am I in

16 anywise interested in the result of said case.

17 Dated this 3rd day of August, 2004.

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RAY D. CONVERY

24

Court Reporter and Notary Public

25

State of Florida at Large

